UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

ROCKY BRANDS, INC., et al.,)	
)	Judge Watson
Plaintiffs,)	
,)	Magistrate Judge King
v.)	
)	Case No. C2 06 275
RED WING SHOE COMPANY, INC.,)	
et al.,)	
)	
Defendants.)	

DAUBERT MOTION OF DEFENDANTS RED WING SHOE COMPANY, INC. AND RED WING BRANDS OF AMERICA, INC., TO EXCLUDE TESTIMONY AND REPORT OF PLAINTIFFS' EXPERT THE MANTIS GROUP, INC.

Now come Defendants Red Wing Show Company, Inc. and Red Wing Brands of America, Inc. ("Red Wing"), by and through counsel, and pursuant to Fed. R. Evid. 702, this Court's Case Management Procedures, and this Court's Trial Order dated September 29, 2009, hereby move this Court for an Order excluding from presentation at trial the Report Pursuant to Rule 26(a)(2)(B) prepared by The Mantis Group, Inc. on behalf of counsel for Plaintiffs Rocky Brands, Inc. and Lehigh Safety Shoe Company LLC ("Plaintiffs"), as well as any and all testimony or evidence related thereto. A Memorandum in Support of this Motion is attached hereto.

Respectfully submitted,

/s/ Joseph R. Dreitler

Joseph R. Dreitler (0012441) Mary R. True (0046880) BRICKER & ECKLER LLP 100 South Third Street Columbus, OH 43215 Phone: (614) 227-2300

Fax: (614) 227-2390 jdreitler@bricker.com mtrue@bricker.com

Counsel for Defendants Red Wing Shoe Company, Inc. Red Wing Brands of America, Inc.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Report prepared by The Mantis Group, Inc. (the "Survey") (Dkt. 106, Attachment 2, Exhibit 2) and the June 5, 2008 deposition testimony of George Mantis ("Mantis Depo.") (Dkt. 106, Attachment 2) is expert opinion of the worst kind. Not only is the Survey methodology fatally flawed, it was conducted in a biased manner and violated the most basic principles of survey research. Yet despite these glaring deficiencies, Mr. Mantis nonetheless claims that the Survey is evidence of three conclusions: (1) that the language "made in USA with imported materials" on Red Wing's Irish Setter hunting boots is likely to lead consumers to mistakenly believe that the boots are made in the USA; (2) that promoting the WORX brand of work boots in association with Red Wing causes the same confusion of manufacturing origin; and (3) that a consumer's "perception of country of origin will have a significant influence on the purchase decision." Survey, p. 9. There simply is no support for the conclusions Mantis has drawn and no excuse for the methods he used to get there.

A brief summary of the Survey is instructive. It was conducted exclusively at gun and knife collector shows, two each in Tennessee and Pennsylvania, in small towns less than 100 miles apart in each state. Survey, p. 2; Mantis Depo., p. 116. Screened respondents (383 in total) were interviewed according to one of three questionnaire versions. Id. at 3, 10-15. Version 1 ("V1") showed respondents a single Irish Setter hunting boot, style 3858, with its original tags stating "made in the USA with imported materials." Id.; Mantis Depo., p. 132. Version 2 ("V2") showed respondents the same style boot, but with the words "with imported materials" covered by redacting tape, portions of the tag highlighted, and with the label inside the boot tongue manually cut out. Id.; Mantis Depo., pp. 144-48. Version 3 ("V3") showed respondents the cover page of a Red Wing/WORX catalogue bearing the image of a pair of

boots, the words "Red Wing Shoe Company, Inc." and the "Red Wing Shoes, Since 1905" and "WORX by Red Wing Shoes" logos. Id. 4.

The survey screened out persons: under the age of eighteen; employed by (or with family in) marketing or footwear firms; who had participated in a marketing survey in the past thirty days; or who wore glasses or contacts but were without their lenses. Id. at 2-3. The only other criterion used to qualify respondents was a requirement that (for V1 and V2) "within the past 12 months [they] had purchased hunting boots or within the next 12 months were likely to do so," or (for V3) had purchased or were likely to purchase either "hunting or work boots" over the same period. Id. at 2. Respondents were then shown the stimulus and asked the following: (for V1 and V2) Question #1: "Where do you think this product is made?" or (for V3) Question #1: "Where do you think shoes from this company are made?", as well as Question #2 ("Q2") (all versions): "Why do you say that? Anything else?" Id. at 4.

Immediately thereafter, all respondents were then asked to assume "two brands of hunting boots...the same in every respect [except that] one...is made in the USA and the other...in another country." Id. They were then shown a card with Question #3 ("Q3"), which asked, "Which one of these statements describes the boot you would purchase?" and gave respondents four choices: (1) the boot "made in the USA"; (2) the boot "made in another country"; (3) no preference; or (4) don't know. Id. at 4-5. After answering, respondents were asked the same follow-up questions as in Q2. The interviews were watched in real-time by a third party observer, but were not validated after completion. Id.

As is apparent from this brief summary, the deficiencies in relevance and reliability inherent in the Survey are numerous and fatal, and each unsurprisingly skews the results wildly

in Plaintiffs' favor. They include fatal universe and stimulus selection problems, leading, biased and ambiguous questions, and a complete failure to replicate marketplace conditions, just to name a few. The Court should not allow the Survey, or any evidence or testimony related thereto, to be admitted at the trial of this matter.

II. APPLICABLE LAW

The admissibility of expert testimony is governed generally by Fed. R. Evid. 702, which provides that an expert may testify only if:

(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial judge is assigned "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993); *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 407 (6th Cir. 2006). In addition, survey evidence should satisfy the following elements before it is admitted:

(1) the "universe" was properly defined, (2) a representative sample of that universe was selected, (3) the questions...were framed in a clear, precise and non-leading manner, (4) sound interview procedures were followed by competent [and unbiased] interviewers, (5) the data...was accurately reported, (6) the data was analyzed in accordance with accepted statistical principles, and (7) objectivity of the process was assured.

Safe Auto Insurance Co. v. State Automobile Mutual Insurance Co., 2009 U.S. Dist. LEXIS 94859, *5 (S.D. Ohio 2009) (citing Leelanau Wine Cellars, Ltd. v. Black & Red, Inc., 452 F. Supp. 2d 772, 778 (W.D. Mich. 2006), aff'd, 502 F.3d 504 (6th Cir. 2007)).

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¹ It is worth noting at the outset that the objectivity of the entire Survey is highly questionable in light of the extensive and improper role counsel played in its design and, possibly even interpretation. See, e.g., Mantis Depo., pp. 35, 77-78. (discussing counsel's role in selection of locations and stimuli for the Survey). See also, Exhibits 1-4 attached hereto (emails showing same, as well as correspondence between counsel and Mantis sharing preliminary results of Survey events and an intent to discuss prior to finalization of the Survey). See *Yapp v. Union Pacific R.R. Co.*, 301 F. Supp. 2d 1030, 1037 (E.D. Mo. 2004) ("the heavy involvement of...counsel in the design and conduct of a survey used to guide expert statistical analyses indicates a lack of independence and thus a lack of scientific validity") (citing Federal Judicial Center, *Reference Manual on Scientific Evidence*, pp. 231-279 (2d ed. 2000)).

"A survey should be excluded if, after evaluating these factors, the court finds the survey irrelevant or finds that its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Powerhouse Marks LLC v. Chi Hsin Impex, Inc.*, 2006 U.S. Dist. LEXIS 16454, *8 (E.D. Mich. 2006) (citing Fed. R. Evid. 402 & 403). In addition, "[s]urvey evidence that is so flawed that it renders the results unreliable must be excluded." *Whirlpool Properties, Inc. v. LG Electronics U.S.A., Inc.*, 2006 U.S. Dist. LEXIS 1378, *9 (W.D. Mich. 2006). "The proponent of the survey bears the burden of establishing its admissibility." *Leelanau*, 452 F. Supp. at 778.

III. <u>ARGUMENT</u>

A. THE MANTIS SURVEY IS IRRELEVANT AND MUST BE EXCLUDED IN ITS ENTIRETY.

1. The Survey's Universe of Respondents is Fatally Unrepresentative.

The Mantis Survey used a universe of respondents so unrepresentative of the relevant market that the entire Survey is inadmissible. "Selection of a proper universe is so critical that 'even if the proper questions are asked in a proper manner, if the wrong persons are asked, the results are likely to be irrelevant." *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F.Supp. 2d 734, 767 (E.D. Mich. 2003) (quoting 5 McCarthy, § 32:159 at 32-250.3). See also, *Leelanau*, 452 F.Supp. 2d at 781. In a Lanham Act case, a survey must "employ screening criteria to ensure that the universe was limited to those who were potential purchasers of the defendant's product." *Leelanau* at 782. See also, *Cumberland Packing Corp. v. Monsanto Co.*, 32 F. Supp. 2d 561, 571-72 (E.D. N.Y. 1999) ("the survey universe must be composed of people having a present purchasing interest in the product being surveyed"); *Leelanau* at 781-83. However, a survey will be "fatally underinclusive" if it fails to "sample 'the full range of potential [consumers] for

whom plaintiff and defendants compete." *Winning Ways, Inc. v. Holloway Sportswear, Inc.*, 913 F.Supp. 1454, 1467 (D. Kan. 1996) (internal quotation omitted).

a. The entire Survey universe is fatally overinclusive.

First, the Survey fails to follow the cardinal rule of universe selection by including respondents who are not potential purchasers of the products tested. Indeed, the Survey's complete failure to distinguish between past purchasers and potential purchasers of the products being tested is fatal. Survey, p. 2; *American Footwear Corp. v. General Footwear Corp.*, 609 F.2d 655, 660 n.4 (2nd Cir. 1979). Mantis specifically included past boot purchasers in the Survey, even though they are completely irrelevant to a survey of likelihood of confusion.² Id. See *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 576, 604 (S.D. N.Y. 2007). Even more, the screening questions ask only about *types* of boots. They did not account in any way for specific purchasing preferences of consumers, including price point (Mantis Depo, p. 53) and typical method of purchase (e.g., internet versus retail store or shoemobile), which are essential to determining whether an interviewee is truly a potential purchaser of "the product being surveyed." *Cumberland*, 32 F. Supp. 2d at 572. This flaw makes it entirely possible that *not one* Survey respondent was truly a potential purchaser of the tested boots.

Second and equally fatal is the nonsensical failure in V3 to distinguish between hunting boot purchasers on one hand and work boot purchasers on the other. The screening question only limits respondents to those who "had purchased [or might purchase] hunting *or* work boots" during the stated time period. Survey, p. 2 (emphasis added). As a consequence, a purchaser of hunting boots who was not a potential buyer of work boots of any kind, nonetheless provided responses to a survey that was purportedly designed to test "whether and if so, to what extent

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² In fact, according to the Survey, 44%, 36%, and 19% of respondents for V1, V2, and V3 respectively were unequivocally <u>NOT</u> potential purchasers even of the *category* of boot about which Mantis inquired. Survey, p. 14.